

1. **LISBOA DE SOUZA (Migration) [2018] AATA 30 (11 January 2018)**
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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Jairo LISBOA DE SOUZA

CASE NUMBER: 1709798

DIBP REFERENCE(S): BCC2017/339044

MEMBER: Lilly Mojsin

DATE: 11 January 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:

- Public Interest Criterion 4020 for the purposes of cl.500.217 of Schedule 2 to the Regulations.

Statement made on 11 January 2018 at 2:58pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – Evidence of an offer of employment in home country – Did not provide bogus documentation to the Department

LEGISLATION

Migration Act 1958, ss 5(1), 65, 359A

Migration Regulations 1994, Schedule 2 500.217, 572.227 Schedule 4 4020(1); 4020(2), 4020 (2AA); 4020(2A), 4020(2B), 4020(2BA), 4020(3), 4020(4), 4020(5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 April 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 25 January 2017.
8. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that there was evidence before the Minister that the applicant had provided, or caused to be provided, a bogus document or false or misleading information in relation to the visa application and the applicant did not meet Public Interest Criterion 4020 (PIC 4020).
9. The Tribunal sent to the applicant a letter pursuant to s.359A of the Act on 30 October 2017 stating:
 - On your electronic student visa application, dated 25 January 2017, you declared your status as employed and that you worked for a logging company in Brazil called *Madereira Nunes e Carmo Ltda-Me* as a manager. You further declared that you had been offered a job with the same employer on completion of your course in Australia.
 - Checks were done on 6 March 2017 by the Australian Embassy in Brasilia. The business owner of *Madereira Nunes e Carmo Ltda-Me* was contacted and he advised that your employment was terminated sometime around early 2016 and there was no agreement to re-employ you on your return to Brazil.
10. The applicant responded on 9 November 2017 stating:
 11. Mr. Jairo confirms that the employment letter provided is real and employment is available for him.
 12. The Immigration called on 06/03/2017 and spoke with the new reception laid Miss. Ana Luiza Caetano Ferreira, she is a new employee since January 2017. During the call, the immigration asked her if she knew any: Jairo Lisboa De Souza or if he works or worked there, she replied: NO
 13. Please note Mr. Jairo arrived in Australia on 29/10/2016 and he never worked or met Miss Ana Luiza Caetano Ferreira as she only started to work for the company since January 2017.
 14. The Owner and Director Mr. Jose Maria is able and happy to confirm the authenticity of the letter, Mr. Jairo employment, and all the misunderstanding of the Immigration Department.
15. The applicant appeared before the Tribunal on 13 December 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Portuguese and English languages. The applicant was adamant that the information provided by the Department was incorrect.

16. The applicant provided a letter from Jose Maria do Carmo, dated 2 December 2017, who confirmed that the applicant has worked for him since 2014, he has an approved holiday to study in Australia and confirmed that the Department never spoke to him but with his new receptionist. He also confirmed that the applicant has never met or spoken to his receptionist and he confirmed that the applicant would return to employment with his company on his return to Brazil.
17. The Tribunal attempted to call the owner and Director Mr Jose Maria do Carmo, during the hearing, but was unable to contact him.
18. The Tribunal wrote to the Department seeking further information. The Tribunal sought interview transcripts or any notes regarding the call made to Madereira Nunes e Carmo Ltda-Me on the 6th March and in particular information regarding whether or not the Department officer spoke to a male or a female.
19. The Department responded advising the Tribunal that the officer who had made the call was no longer working in the Brasilia office, could not recall the conversation and the only notes available were those recorded on ICSE.

20. REASONS AND FINDINGS

21. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.227 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
22. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

23. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
24. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
25. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
26. The delegate of the Department found that the applicant had breached PIC 4020 because in his application for the visa under the heading Employment he had declared his "Employment status" to be "Employed" and under the heading Future Employment he had declared "Yes" to the question "Has the applicant been offered a job at the completion of their course?" In support he had submitted a Genuine Temporary Entrant Statement containing the following declarations:
27. I have been working for Madereira Nunes e Carmo Ltda, it's a very promising logging company in Brazil, which has aimed exportation based on the numbers from past and the forecast until 2025 As the company produces pine, the most exported type of wood for its utility and Brazil is the largest producer of this wood, I would like to introduce my company to be part of the exporting companies list, which means new clients overseas and significative profit increase. However, I don't want to use any intermediaries as they can get up to 30% of profit. At this stage, the company doesn't have any bilingual employee, and I feel as a manager I should study to get this knowledge and position the company to achieve this big goal
28. I will dedicate this time to learn English and then I will go back to Brazil to work on this professional project.
29. The delegate further stated that on 6 March 2017, as part of the routine processing of the application, a Departmental Officer from the Australian Embassy in Brasilia contacted the employer Madereira Nunes e Carmo Ltda and spoke to the business owner. The business owner stated the applicant was previously employed by the company however his employment was terminated in early 2016. The business owner additionally stated that there was no agreement to re-employ the applicant upon his return to Brazil.
30. The delegate found that the Departmental investigations indicated that the applicant was not currently employed by Madereira Nunes e Carmo Ltd and he did not have a mandate to return as his employment had been terminated in early 2016. This is denied by the business owner, by letter dated 2 December 2017. The Tribunal could not locate any relevant records

on ICSE. No further information has been obtained from the Department to assist the Tribunal in assessing who the Department officer spoke to.

31. The Department evidence regarding the telephone conversation of the officer in Brasilia with a person in the office of the employer is insufficient for the Tribunal to make a finding with confidence. Therefore the Tribunal must give the applicant the benefit of the doubt.
32. The Tribunal finds that the applicant therefore did not provide a bogus document, or false or misleading information to the Department.
33. Therefore, the applicant meets cl.4020(1).

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

34. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal to suggest that there is an issue with the applicant's identity.
35. Therefore, the applicant meets cl.4020(2A).
36. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.500.217.

DECISION

37. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
 - Public Interest Criterion 4020 for the purposes of cl.500.217 of Schedule 2 to the Regulations.

Lilly Mojsin
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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